

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

XAVIER ANTONIO HENRY,

Defendant-Appellant.

UNPUBLISHED

May 27, 2010

No. 289859

Ingham Circuit Court

LC No. 07-000978-FH

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.115a(2), and acquitted of domestic assault and battery, MCL 750.81(2). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to serve 12 to 24 years in prison for his conviction. Defendant appeals as of right and we affirm.

Defendant met complainant in June 2007. She stated that he called her several times a day and visited her, unannounced, “a couple times” at her residence. Complainant and defendant also reportedly attended a birthday party for defendant’s aunt. Complainant denied a sexual relationship with defendant. Complainant stated that on July 18, 2007, defendant confronted her at the hospital and yelled at her. He then arrived at her residence and ultimately slapped her. She may have attended his aunt’s birthday party afterwards.

On July 21, 2007, defendant went to complainant’s home but did not find her. He allegedly called her several times and she allegedly told him that she was socializing with two other men. Later, she had male and female guests at her home. Defendant was heard speaking to complainant from outside the home after she had gone into her bedroom to sleep and one of the male visitors had gone into the room to speak with her. Defendant then allegedly tried to enter the residence through the front door, demanded that complainant open the door, and questioned complainant about the man in her room. Complainant testified that defendant was questioning her about possible romantic activity. There was testimony that complainant refused to let defendant in the home.

Complainant stated that she then heard the screen in her bedroom window rip and the fan in the window fall to the floor. She and another witness then heard the screen window open and complainant saw defendant’s head and upper body inside her room. Complainant stated that defendant grabbed her, and was pulling her out the window while the man in the room with her

was pulling in the opposite direction. She described being pulled up against the wall and scraping her arm on the window screen before she could elude defendant's grasp. Complainant's arm was injured. Complainant reported that defendant then entered her bedroom through the window, and fought with the other man and two other male friends who entered the room. Defendant then exited through the window and the confrontation continued outside.

Defendant first argues that the jury instructions were confusing, and resulted in inconsistent verdicts. Unpreserved issues are reviewed for plain error. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). To establish plain error defendant must show that a clear or obvious error occurred that affected a substantial right. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is appropriate only if the plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity or public reputation of the judicial proceedings. *Id.*

While initially instructing the jury on the elements of first-degree home invasion, the judge erroneously stated that the jury would have to find that defendant committed the offense of *domestic assault*. When initially instructing on the crime of domestic assault the judge stated that the prosecutor would have to prove:

First, that the defendant assaulted and battered [complainant]. A battery is a forceful, violent, or offensive touching of a person or something closely connected with her. The touching must have been intended by the defendant; that is, not accidental, and it must have been against [complainant's] will.

An assault is an attempt to commit a battery or an illegal act that caused [complainant] to reasonably fear an immediate battery. The defendant must have intended either to commit a battery or to make [complainant] reasonably fear an immediate battery.

* * *

Second, that at the time [complainant] was a person with whom the defendant had a dating relationship.

The jury deliberated and then returned with two questions. The first question was, "Is the domestic assault element of the home invasion definition the same as the domestic assault charge definition?" The court answered, "Yes." The second question was whether a dating relationship could be one-sided such that only defendant thought they were dating. The trial judge instructed: "Any further definition of dating relationship is not specified in the jury instructions, and you need to just refer to the jury instruction and . . . use your good judgment as far as that."

The judge then called the jury back and corrected the home invasion instructions. The judge eliminated the reference to "domestic assault" and instructed that defendant need only have committed the offense of *assault*. The judge then defined the offense of assault:

To prove an assault – to prove the crime of assault, the prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the defendant committed a battery on [complainant]. A battery is a forceful, violent, or offensive touching of the person or something closely connected with the person or another. The touching must have been intended by the defendant; that is, not accidental, and it must have been against [complainant's] will. It does not matter whether the touching caused an injury.

Second, that the defendant intended either to commit a battery upon [complainant] or to make [her] reasonably fear an immediate battery.

The jury subsequently returned with another question inquiring whether there had to be a battery for a first-degree home invasion conviction and the judge erroneously stated that there need not be a battery for the domestic assault charge. The judge then read the amended instructions on the first-degree home invasion charge, but did not read the instructions for domestic assault and battery.

Defendant argues that the confusing jury instructions resulted in inconsistent verdicts. He asserts that the acquittal on the domestic assault and battery charge precluded a guilty verdict on the first-degree home invasion charge because the first-degree home invasion instruction initially indicated that a domestic assault was required. However, given the amended instructions, no such finding was required to convict defendant of first-degree home invasion.

Additionally, a jury may reach inconsistent verdicts as a result of mistake, compromise, or leniency. *People v Goss*, 446 Mich 587, 597; 521 NW2d 312 (1994). The jury can choose, without any apparent logical basis, what to believe and what to disbelieve because the jury is the sole judge of all the facts. *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980). However, inconsistent verdicts might be cause for reversal when it is evident that the jury was confused, did not understand the instructions, or did not know what it was doing. *People v McKinley*, 168 Mich App 496, 510; 425 NW2d 460 (1988). Defendant contends that this is such as case. However, the judge twice clarified and reinforced what was required to convict defendant of the first-degree home invasion charge and defendant was found not guilty of the domestic violence charge. Therefore, there was no evidence of ultimate confusion.

Moreover, the verdicts were not necessarily inconsistent. Verdicts are not inconsistent where there is an interpretation of the evidence that provides a logical explanation for the findings of the jury. *Id.* at 462-463. *People v Tombs*, 472 Mich 446, 462-463; 697 NW2d 494 (2005). Regardless of the instructions on assault and battery, the jury may have found that defendant assaulted and battered complainant, but did not have a dating relationship with her, as required for a domestic assault and battery conviction. Based on the evidence, the jury reasonably could have found that the relationship did not meet the “frequent, intimate associations primarily characterized by the expectation of affectional involvement” definition of dating relationship.

Further, reversal is only appropriate where any plain error would have affected a substantial right of defendant. *Carines*, 460 Mich at 763. Because defendant was found not guilty of the domestic violence charge, and was found to have met the elements for conviction of the first-degree home invasion charge based on the testimony of witnesses that the jury chose to believe, no substantial right of defendant was affected.

Defendant argues that the jury instructions regarding the elements of the crimes were confusing to the extent that they could not be corrected. A trial court is required to instruct the jury concerning the law applicable to the case and to present the case fully and fairly to the jury in an understandable manner. MCL 768.29; *People v Henry*, 239 Mich App 140, 151; 607 NW2d 767 (1999). A defendant in a criminal trial is entitled to have a properly instructed jury consider the evidence against him or her. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them. *People v Clark*, 274 Mich App 248, 255-256; 732 NW2d 605 (2007). Jury instructions should be read as a whole to determine if there is error. *People v Hess*, 214 Mich App 33, 36; 543 NW2d 332 (1995).

Because defendant was found not guilty of domestic violence, defendant's substantial rights were not affected by the jury instructions for this charge. Considering the instructions for first-degree home invasion, there was initially instructional error. As previously stated, however, there was a correction.

As a general rule, juries are presumed to follow their instructions. *People v Torres*, 222 Mich App 411, 423; 564 NW2d 149 (1997). It appears that the jury believed there had to be a battery in order to convict defendant of first-degree home invasion. Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Mass*, 238 Mich App 333, 339; 605 NW2d 322 (1999). Because of the instructions, plaintiff was required to prove more than is ordinarily required for a first-degree home invasion conviction, sufficiently protecting defendant's rights. *Carines*, 460 Mich at 763.

Next, defendant argues that he received ineffective assistance of counsel. A defendant's right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963 art 1, § 20. This right encompasses the effective assistance of counsel. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). The right to effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). To establish a claim of ineffective assistance of counsel a defendant must show (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense. *People v Taylor*, 275 Mich App 177, 186; 737 NW2d 790 (2007). A counsel's performance is deficient if it fell below an objective standard of professional reasonableness. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). The performance prejudices the defense if it is reasonably probable that, but for counsel's error, the result of the proceeding would have been different. *Id.*

Defendant first contends that his trial counsel was ineffective for failing to request discovery and subpoena witnesses. He argued that testimony by his mother and phone records would have demonstrated that he and complainant were in a relationship, and would have countered any statement by the prosecutor that defendant "had no business being [at complainant's residence]." The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel when it deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 554 N.W.2d 899 (1996). A substantial defense is one that might have made a difference in the outcome of the trial. *Id.* Here, defense counsel did call witnesses to elicit information about the extent of the defendant's relationship with complainant. Defendant's aunt, Linda Thornton, testified that defendant and complainant were dating and that complainant liked defendant a lot.

Defendant's cousin, Carol Harris, testified that she and defendant had appropriately been at complainant's residence on the day of the home invasion, and that defendant spoke calmly with complainant on the phone the same day. Perhaps defendant's mother and the phone records could have bolstered this information and contradicted complainant's version of a strained relationship. However, the jury was presented with this type of information and defendant was not deprived of this defense.

Additionally, defense counsel has wide discretion as to matters of trial strategy. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). It is possible that defense counsel did not wish to emphasize a dating relationship. The relationship was not a defense to home invasion. Further, it is likely that the jury found defendant not guilty of domestic violence because a dating relationship between was not established. The likely trial strategy did not deprive defendant of a defense, but resulted in a successful defense to the domestic violence charge.

Defendant also argues that defense counsel was ineffective for failing to object to the admission of evidence that he assaulted complainant three days before the home invasion. Use of other acts as evidence of character is precluded, except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's history of misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998). MRE 404(b)(1) provides for the admission of evidence of prior bad acts for several purposes. It provides as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Generally, to be admissible under MRE 404(b), bad acts evidence: (1) must be offered for a proper purpose, (2) must be relevant, and (3) must not have a probative value substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

Plaintiff proffered this evidence to show defendant's intent and lack of mistake in going to complainant's residence. In closing arguments, plaintiff asserted that the previous violence demonstrated a possible motive for defendant to return to the residence, a system of behavior, and that the subsequent assault was not a mistake or an accident. Plaintiff also stated that the prior incident tended to prove that the relationship between defendant and complainant had ended. These were proper purposes. The evidence also had to be relevant. *Knox*, 469 Mich at 509. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the case more probable or less probable than it would be without the evidence." MRE 401. Here, the evidence was relevant to establish that defendant's motive and intent was to confront complainant when he arrived at her residence and that defendant and complainant had a conflicted relationship. Notably, where a defendant is accused of an offense involving domestic violence, evidence of his commission of other acts of domestic violence is admissible for any purpose for which it is relevant unless excluded by MRE

403. MCL 768.27b(1); MCL 768.27b(6); *People v Schultz*, 278 Mich App 776, 778; 754 NW2d 925 (2008).

Unfair prejudice does not mean that the evidence is damaging. *Lewis v Legrow*, 258 Mich App 175, 199; 670 NW2d 675 (2003). Rather, unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *Taylor v Mobley*, 279 Mich App 309, 315; 760 NW2d 234 (2008). Evidence that is unfairly prejudicial goes beyond the merits of the case to inject issues broader than a defendant's guilt or innocence. *People v McGhee*, 268 Mich App 600, 614; 709 NW2d 595 (2005). Here, there was a danger that the jury would infer from this evidence that defendant assaulted complainant as charged, because he reportedly did so three days earlier. Coextensively, a renewed objection to its admission by defense counsel may have been meritorious. However, even if erroneously admitted and counsel's performance was deficient, this evidence did not likely influence the outcome of the case. It is not reasonably probable that, but for counsel's error, the result of the proceeding would have been different. *Jordan*, 275 Mich App at 667. Two witnesses testified that defendant broke through the window of complainant's residence and assaulted her. Three witnesses testified that complainant had some sort of injury on her arm as a result of the incident, and a witness also testified that defendant had injuries. This testimony was ample to convict defendant of first-degree home invasion regardless of the testimony about the alleged assault three days earlier.

Defendant also argues that defendant's trial counsel was ineffective for failing to object to the confusing jury instructions and failing to move for a mistrial given the confusing instructions. Because the initial instructions were inaccurate, a defense counsel objection and/or motion for mistrial would likely have been meritorious. However, defendant is not able to demonstrate that this possible error prejudiced him. As discussed, defendant was found not guilty of domestic violence, and the instructions for his home invasion conviction actually required a finding of battery.

Defendant also argues that the trial court erred in not holding an evidentiary hearing regarding his ineffective assistance claim. Defendant moved for a new trial and requested an evidentiary or *Ginther*¹ hearing. A trial court's decision on a motion for an evidentiary hearing is reviewed for an abuse of discretion. *People v Mischley*, 164 Mich App 478, 482; 417 NW2d 537 (1987).

Prior to denying defendant's motion, the court discussed the evidence. Defendant had argued that, inconsistent with her preliminary examination testimony, the complainant had said that defendant did not rip her screen. The court found that complainant's trial testimony was consistent with her preliminary examination testimony, and established the elements for defendant's conviction regardless of the "ripped screen" testimony. The court found no evidence to support defendant's allegations. Moreover, the trial court heard the evidence introduced at trial, read both defendant's handwritten motion to vacate his conviction and his counsel's motion for a new trial, and heard oral argument on the matter. The trial court adequately explained its

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

reasoning for not holding an evidentiary hearing, and this reasoning is supported by the record. The court's determination was not an abuse of discretion.

Affirmed.

/s/ Douglas B. Shapiro

/s/ Kathleen Jansen

/s/ Pat M. Donofrio